

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

OULA ZAKARIA, individually and as
a representative of the class,

Plaintiff,

vs.

GERBER PRODUCTS CO., a
corporation, d/b/a NESTLE
NUTRITION, NESTLE INFANT
NUTRITION, AND NESTLE
NUTRITION NORTH AMERICA,

Defendant.

Case No. 2:15-cv-00200-JAK-E

DISCOVERY MATTER

**~~[PROPOSED]~~ PROTECTIVE ORDER
FOR CONFIDENTIAL
INFORMATION**

Magistrate: Hon. Charles F. Eick

Action Filed: January 9, 2015

Trial date: July 19, 2016

1 **1. PURPOSE AND LIMITS OF THIS ORDER**

2 Discovery in this action is likely to involve confidential, proprietary or private
3 information requiring special protection from public disclosure and from use for any
4 purpose other than this litigation. Thus, the Court enters this Protective Order. This
5 Order does not confer blanket protections on all disclosures or responses to
6 discovery, and the protection it gives from public disclosure and use extends only to
7 the specific material entitled to confidential treatment under the applicable legal
8 principles. This Order does not automatically authorize the filing under seal of
9 material designated under this Order. Instead, the parties must comply with Local
10 Rule 79-5.1 and this Court's Order Re Pilot Program for Under Seal Documents if
11 they seek to file anything under seal. This Order does not govern the use at trial of
12 material designated under this Order.

13 **2. DESIGNATING PROTECTED MATERIAL**

14 **2.1 Over-Designation Prohibited.** Any party or non-party who designates
15 information or items for protection under this Order as "CONFIDENTIAL,"
16 "HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY," or "HIGHLY
17 CONFIDENTIAL – SOURCE CODE" (a "designator") must only designate specific
18 material that qualifies under the appropriate standards. To the extent practicable, only
19 those parts of documents, items or oral or written communications that require
20 protection shall be designated. Designations with a higher confidentiality level when
21 a lower level would suffice are prohibited. Mass, indiscriminate, or routinized
22 designations are prohibited. Unjustified designations expose the designator to
23 sanctions, including the Court's striking all confidentiality designations made by that
24 designator. Designation under this Order is allowed only if the designation is
25 necessary to protect material that, if disclosed to persons not authorized to view it,
26 would cause competitive or other recognized harm. Material may not be designated if
27 it has been made public, or if designation is otherwise unnecessary to protect a
28 secrecy interest. If a designator learns that information or items that it designated for

1 protection do not qualify for protection at all or do not qualify for the level of
2 protection initially asserted, that designator must promptly notify all parties that it is
3 withdrawing the mistaken designation.

4 **2.2 Manner and Timing of Designation.** Designation under this Order
5 requires the designator to affix the applicable legend ("CONFIDENTIAL,"
6 "HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY," or "HIGHLY
7 CONFIDENTIAL – SOURCE CODE") to each page that contains protected material.
8 For testimony given in deposition or other proceeding, the designator shall specify all
9 protected testimony and the level of protection being asserted. It may make that
10 designation during the deposition or proceeding, or may invoke, on the record or by
11 written notice to all parties on or before the next business day, a right to have up to 21
12 days from the deposition or proceeding to make its designation.

13 **2.2.1** A party or non-party that makes original documents or materials
14 available for inspection need not designate them for protection until after the
15 inspecting party has identified which material it would like copied and produced.
16 During the inspection and before the designation, all material shall be treated as
17 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY. After the inspecting party
18 has identified the documents it wants copied and produced, the producing party must
19 designate the documents, or portions thereof, that qualify for protection under this
20 Order.

21 **2.2.2** Parties shall give advance notice if they expect a deposition or other
22 proceeding to include designated material so that the other parties can ensure that
23 only authorized individuals are present at those proceedings when such material is
24 disclosed or used. The use of a document as an exhibit at a deposition shall not in any
25 way affect its designation. Transcripts containing designated material shall have a
26 legend on the title page noting the presence of designated material, and the title page
27 shall be followed by a list of all pages (including line numbers as appropriate) that
28 have been designated, and the level of protection being asserted. The designator shall

1 inform the court reporter of these requirements. Any transcript that is prepared before
2 the expiration of the 21-day period for designation shall be treated during that period
3 as if it had been designated HIGHLY CONFIDENTIAL – ATTORNEY EYES
4 ONLY unless otherwise agreed. After the expiration of the 21-day period, the
5 transcript shall be treated only as actually designated.

6 **2.3** An inadvertent failure to designate does not, standing alone, waive
7 protection under this Order. Upon timely assertion or correction of a designation, all
8 recipients must make reasonable efforts to ensure that the material is treated
9 according to this Order.

10 **3. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

11 All challenges to confidentiality designations shall proceed under Local Rule
12 37-1 through Local Rule 37-4.

13 **4. ACCESS TO DESIGNATED MATERIAL**

14 **4.1 Basic Principles.** A receiving party may use designated material only
15 for this litigation. Designated material may be disclosed only to the categories of
16 persons and under the conditions described in this Order.

17 **4.2 Disclosure of CONFIDENTIAL Material Without Further**
18 **Approval.** Unless otherwise ordered by the Court or permitted in writing by the
19 designator, a receiving party may disclose any material designated CONFIDENTIAL
20 only to:

21 **4.2.1** The receiving party's outside counsel of record in this action and
22 employees of outside counsel of record to whom disclosure is reasonably necessary;

23 **4.2.2** The officers, directors, and employees of the receiving party to whom
24 disclosure is reasonably necessary, and who have signed the Agreement to Be Bound
25 (Exhibit E-1);

26 **4.2.3** Experts retained by the receiving party's outside counsel of record to
27 whom disclosure is reasonably necessary, and who have signed the Agreement to Be
28 Bound (Exhibit E-1);

1 **4.2.4** The Court and its personnel;

2 **4.2.5** Outside court reporters and their staff, professional jury or trial
3 consultants, and professional vendors to whom disclosure is reasonably necessary,
4 and who have signed the Agreement to Be Bound (Exhibit E-1);

5 **4.2.6** During their depositions, witnesses in the action to whom disclosure is
6 reasonably necessary and who have signed the Agreement to Be Bound (Exhibit E-1);
7 and

8 **4.2.7** The author or recipient of a document containing the material, or a
9 custodian or other person who otherwise possessed or knew the information

10 **4.3. Disclosure of HIGHLY CONFIDENTIAL – ATTORNEY EYES**
11 **ONLY and HIGHLY CONFIDENTIAL – SOURCE CODE Material Without**
12 **Further Approval.** Unless permitted in writing by the designator, a receiving party
13 may disclose material designated HIGHLY CONFIDENTIAL – ATTORNEY EYES
14 ONLY or HIGHLY CONFIDENTIAL – SOURCE CODE without further approval
15 only to:

16 **4.3.1** The receiving party's outside counsel of record in this action and
17 employees of outside counsel of record to whom it is reasonably necessary to disclose
18 the information;

19 **4.3.2** The Court and its personnel;

20 **4.3.3** Outside court reporters and their staff, professional jury or trial
21 consultants, and professional vendors to whom disclosure is reasonably necessary,
22 and who have signed the Agreement to Be Bound (Exhibit E-1); and

23 **4.3.4** The author or recipient of a document containing the material, or a
24 custodian or other person who otherwise possessed or knew the information.

25 **4.4 Procedures for Approving or Objecting to Disclosure of HIGHLY**
26 **CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL**
27 **– SOURCE CODE Material to In-House Counsel or Experts.** Unless agreed to in
28 writing by the designator:

1 **4.4.1** A party seeking to disclose to in-house counsel any material designated
2 HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY must first make a written
3 request to the designator providing the full name of the in-house counsel, the city and
4 state of such counsel’s residence, and such counsel’s current and reasonably
5 foreseeable future primary job duties and responsibilities in sufficient detail to
6 determine present or potential involvement in any competitive decision-making. In-
7 house counsel are not authorized to receive material designated HIGHLY
8 CONFIDENTIAL – SOURCE CODE.

9 **4.4.2** A party seeking to disclose to an expert retained by outside counsel of
10 record any information or item that has been designated HIGHLY CONFIDENTIAL
11 – ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL – SOURCE CODE
12 must first make a written request to the designator that (1) identifies the general
13 categories of HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY
14 CONFIDENTIAL – SOURCE CODE information that the receiving party seeks
15 permission to disclose to the expert, (2) sets forth the full name of the expert and the
16 city and state of his or her primary residence, (3) attaches a copy of the expert’s
17 current resume, (4) identifies the expert’s current employer(s), (5) identifies each
18 person or entity from whom the expert has received compensation or funding for
19 work in his or her areas of expertise (including in connection with litigation) in the
20 past five years, and (6) identifies (by name and number of the case, filing date, and
21 location of court) any litigation where the expert has offered expert testimony,
22 including by declaration, report or testimony at deposition or trial, in the past five
23 years. If the expert believes any of this information at (4) - (6) is subject to a
24 confidentiality obligation to a third party, then the expert should provide whatever
25 information the expert believes can be disclosed without violating any confidentiality
26 agreements, and the party seeking to disclose the information to the expert shall be
27 available to meet and confer with the designator regarding any such confidentiality
28 obligations.

1 **4.4.3** A party that makes a request and provides the information specified in
2 paragraphs 4.4.1 or 4.4.2 may disclose the designated material to the identified in-
3 house counsel or expert unless, within seven days of delivering the request, the party
4 receives a written objection from the designator providing detailed grounds for the
5 objection.

6 **4.4.4** All challenges to objections from the designator shall proceed under
7 Local Rule 37-1 through Local Rule 37-4.

8 **5. SOURCE CODE**

9 **5.1 Designation of Source Code.** If production of source code is necessary,
10 a party may designate it as HIGHLY CONFIDENTIAL – SOURCE CODE if it is, or
11 includes, confidential, proprietary, or trade secret source code.

12 **5.2 Location and Supervision of Inspection.** Any HIGHLY
13 CONFIDENTIAL – SOURCE CODE produced in discovery shall be made available
14 for inspection, in a format allowing it to be reasonably reviewed and searched, during
15 normal business hours or at other mutually agreeable times, at an office of the
16 designating party's counsel or another mutually agreeable location. The source code
17 shall be made available for inspection on a secured computer in a secured room, and
18 the inspecting party shall not copy, remove or otherwise transfer any portion of the
19 source code onto any recordable media or recordable device. The designator may
20 visually monitor the activities of the inspecting party's representatives during any
21 source code review, but only to ensure that there is no unauthorized recording,
22 copying or transmission of the source code.

23 **5.3 Paper Copies of Source Code Excerpts.** The inspecting party may
24 request paper copies of limited portions of source code that are reasonably necessary
25 for the preparation of court filings, pleadings, expert reports, other papers or for
26 deposition or trial. The designator shall provide all such source code in paper form,
27 including Bates numbers and the label "HIGHLY CONFIDENTIAL – SOURCE
28 CODE."

1 **5.4 Access Record.** The inspecting party shall maintain a record of any
2 individual who has inspected any portion of the source code in electronic or paper
3 form, and shall maintain all paper copies of any printed portions of the source code in
4 a secured, locked area. The inspecting party shall not convert any of the information
5 contained in the paper copies into any electronic format other than for the preparation
6 of a pleading, exhibit, expert report, discovery document, deposition transcript, or
7 other Court document. Any paper copies used during a deposition shall be retrieved at
8 the end of each day and must not be left with a court reporter or any other
9 unauthorized individual.

10 **6. PROTECTED MATERIAL SUBPOENAED OR ORDERED**
11 **PRODUCED IN OTHER LITIGATION**

12 **6.1 Subpoenas and Court Orders.** This Order in no way excuses
13 noncompliance with a lawful subpoena or court order. The purpose of the duties
14 described in this section is to alert the interested parties to the existence of this Order
15 and to give the designator an opportunity to protect its confidentiality interests in the
16 court where the subpoena or order issued.

17 **6.2 Notification Requirement.** If a party is served with a subpoena or a
18 court order issued in other litigation that compels disclosure of any information or
19 items received by that party in this action and designated in this action as
20 CONFIDENTIAL, HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY, or
21 HIGHLY CONFIDENTIAL – SOURCE CODE, that party must do the following.

22 **6.2.1** Promptly notify the designator in writing. Such notification shall include
23 a copy of the subpoena or court order.

24 **6.2.2** Promptly notify in writing the party who caused the subpoena or order to
25 issue in the other litigation that some or all of the material covered by the subpoena or
26 order is subject to this Order. Such notification shall include a copy of this Order.

27 **6.2.3** Cooperate with all reasonable procedures sought by the designator
28 whose material may be affected.

1 **6.3 Wait For Resolution of Protective Order.** If the designator promptly
2 seeks a protective order, the party served with the subpoena or court order shall not
3 produce any information designated in this action as CONFIDENTIAL, HIGHLY
4 CONFIDENTIAL – ATTORNEY EYES ONLY or HIGHLY CONFIDENTIAL –
5 SOURCE CODE before a determination by the court where the subpoena or order
6 issued, unless the party has obtained the designator's permission. The designator shall
7 bear the burden and expense of seeking protection of its confidential material in that
8 court.

9 **7. UNAUTHORIZED DISCLOSURE OF DESIGNATED MATERIAL**

10 If a receiving party learns that, by inadvertence or otherwise, it has disclosed
11 designated material to any person or in any circumstance not authorized under this
12 Order, it must immediately (1) notify in writing the designator of the unauthorized
13 disclosures, (2) use its best efforts to retrieve all unauthorized copies of the
14 designated material, (3) inform the person or persons to whom unauthorized
15 disclosures were made of all the terms of this Order, and (4) use reasonable efforts to
16 have such person or persons execute the Agreement to Be Bound (Exhibit E-1).

17 **8. INADVERTENT PRODUCTION OF PRIVILEGED OR**
18 **OTHERWISE PROTECTED MATERIAL**

19 When a producing party gives notice that certain inadvertently produced
20 material is subject to a claim of privilege or other protection, the obligations of the
21 receiving parties are those set forth in Fed. R. Civ. P. 26(b)(5)(B). This provision is
22 not intended to modify whatever procedure may be established in an e-discovery
23 order that provides for production without prior privilege review pursuant to Fed. R.
24 Evid. 502(d) and (e).

25 **9. FILING UNDER SEAL**

26 Without written permission from the designator or a Court order, a party may
27 not file in the public record in this action any designated material. A party seeking to
28 file under seal any designated material must comply with Local Rule 79-5 and this

1 Court's Standing Order with respect to the filing of under seal documents (Exhibit F).
2 Filings may be made under seal only pursuant to a court order authorizing the sealing
3 of the specific material at issue. The fact that a document has been designated under
4 this Order is insufficient to justify filing under seal. Instead, parties must explain the
5 basis for confidentiality of each document sought to be filed under seal. Because a
6 party other than the designator will often be seeking to file designated material,
7 cooperation between the parties in preparing, and in reducing the number and extent
8 of, requests for under seal filing is essential. Accordingly, counsel are ordered to meet
9 and confer in person or by telephone at least seven (7) calendar days prior to the
10 filing of an application wherein the basis for the sealing is that it has been deemed
11 confidential by the other party. Not later than two (2) calendar days after the meet and
12 confer process, the opposing party shall confirm whether such information shall be
13 designated as confidential or whether it can be made available to the public. Such an
14 application shall contain the dates and method by which the parties met and conferred
15 otherwise it will be denied without prejudice to an amended application being filed
16 after counsel have completed this process. If a receiving party's request to file
17 designated material under seal pursuant to Local Rule 79-5.1 is denied by the Court,
18 then the receiving party may file the material in the public record unless (1) the
19 designator seeks reconsideration within four (4) days of the denial, or (2) as otherwise
20 instructed by the Court.

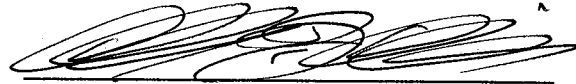
21 **10. FINAL DISPOSITION**

22 Within 60 days after the final disposition of this action, each party shall return
23 all designated material to the designator or destroy such material, including all copies,
24 abstracts, compilations, summaries, and any other format reproducing or capturing
25 any designated material. The receiving party must submit a written certification to the
26 designator by the 60-day deadline that (1) identifies (by category, where appropriate)
27 all the designated material that was returned or destroyed, and (2) affirms that the
28 receiving party has not retained any copies, abstracts, compilations, summaries, or

1 any other format reproducing or capturing any of the designated material. This
2 provision shall not prevent counsel from retaining an archival copy of all pleadings,
3 motion papers, trial, deposition, and hearing transcripts, legal memoranda,
4 correspondence, deposition and trial exhibits, expert reports, attorney work product,
5 and consultant and expert work product, even if such materials contain designated
6 material. Any such archival copies remain subject to this Order.

7
8 **IT IS SO ORDERED**

9 DATED: *10/27/15*



Charles F. Eick
United States Magistrate Judge

EXHIBIT E-1

AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____ [print or type full address], declare under penalty of perjury that I have read in its entirety and understand the Protective Order that was issued by the United States District Court for the Central District of California on _____ [date] in the case of _____ [insert formal name of the case and the number and initials assigned to it by the court]. I agree to comply with and to be bound by all terms of this Protective Order, and I understand and acknowledge that failure to so comply could expose me to sanctions and punishment for contempt. I solemnly promise that I will not disclose in any manner any information or item that is subject to this Protective Order to any person or entity except in strict compliance with this Order.

I further appoint _____ [print or type full name] of _____ [print or type full address and telephone number as my California agent for service of process in connection with this action or any proceeding related to enforcement of this Order.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

[printed name]

Signature: _____

[signature]